

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1926

To be argued by
DAVID R. SPIEGEL

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

**UNITED STATES OF AMERICA ex rel.
DONALD E. RAMSEY,**

*Petitioner-Appellant,
against*

**LEON VINCENT, Superintendent, Green Haven
Correctional Facility, Stormville, New York,**

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7591

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel



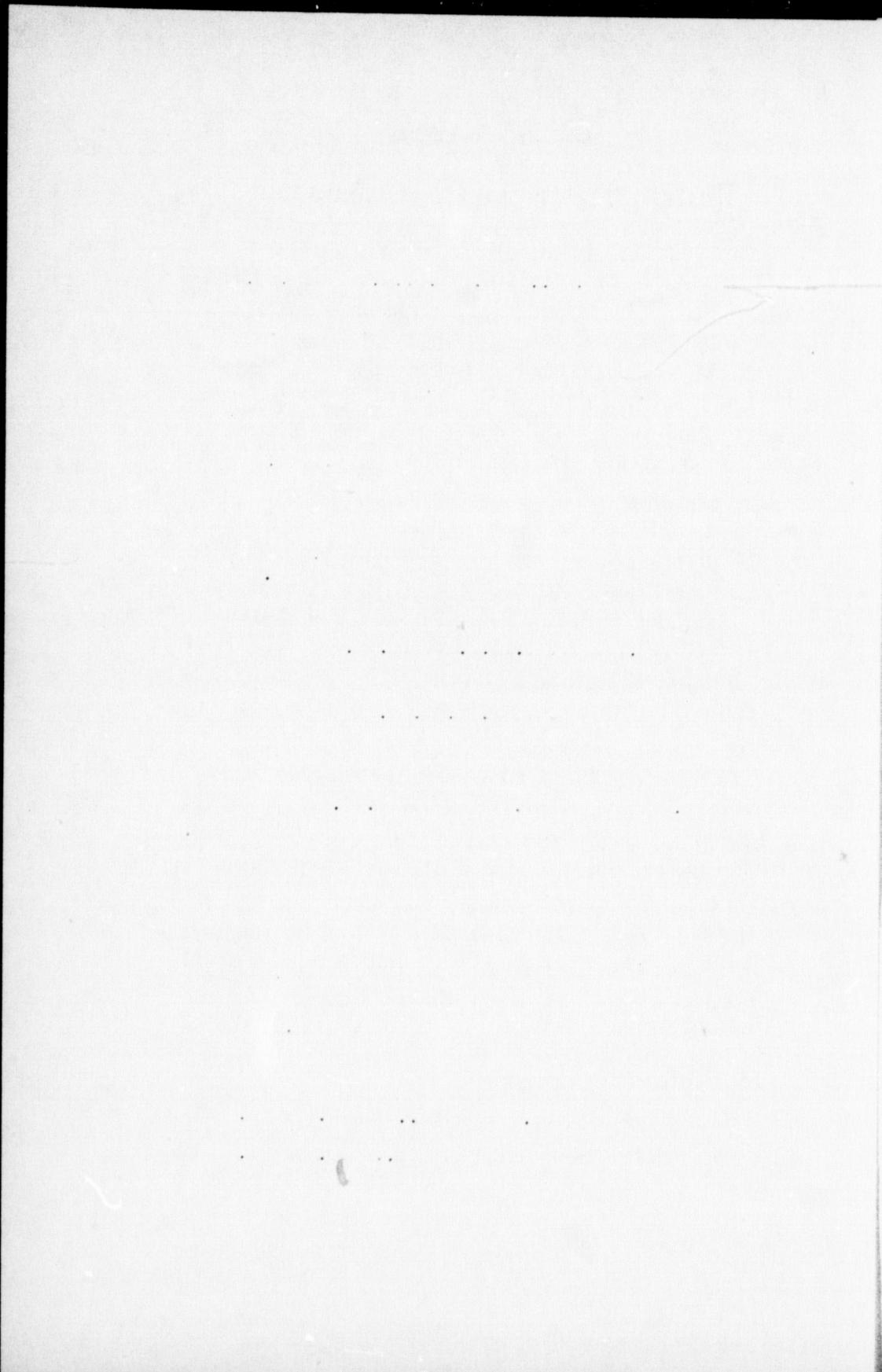


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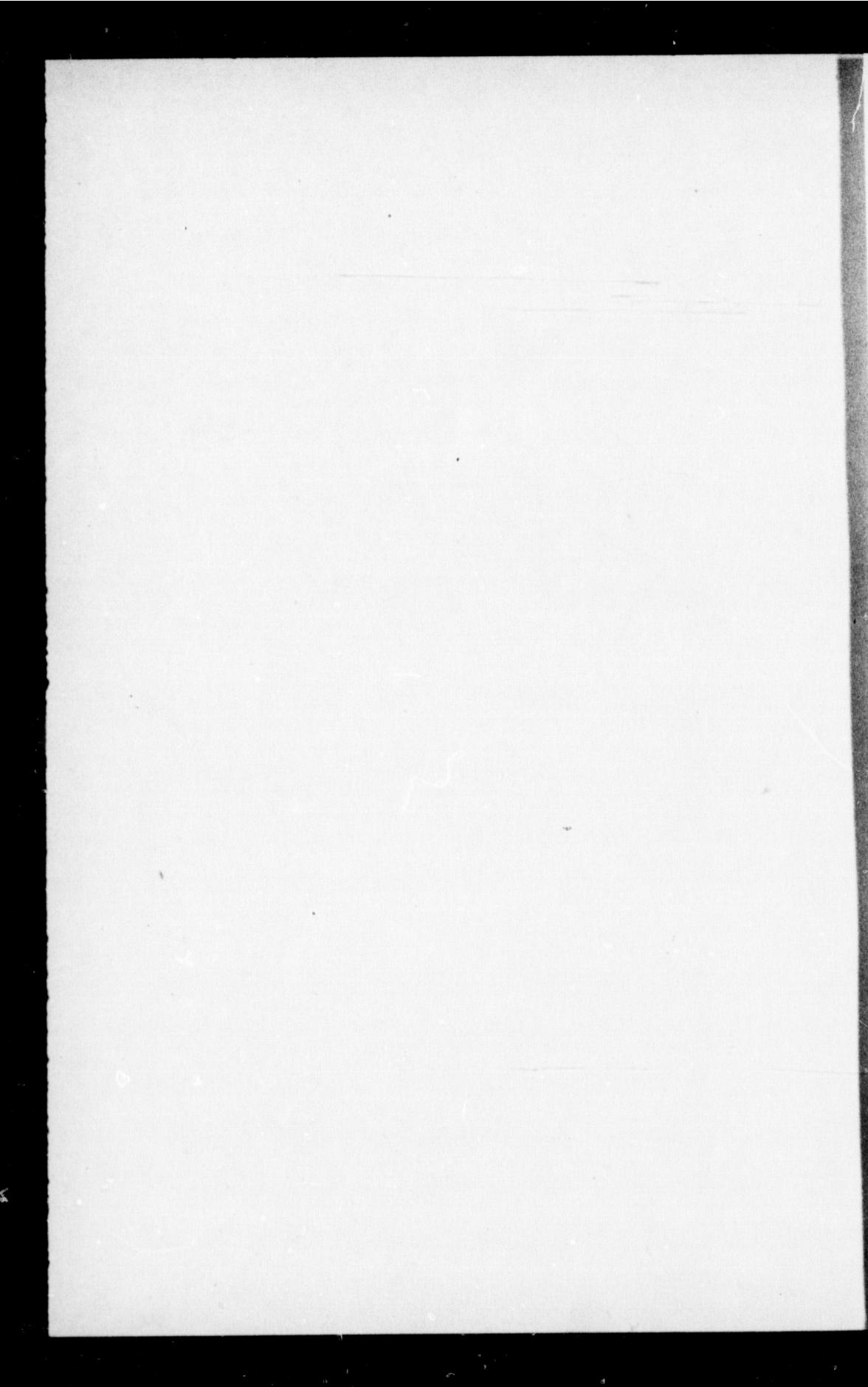
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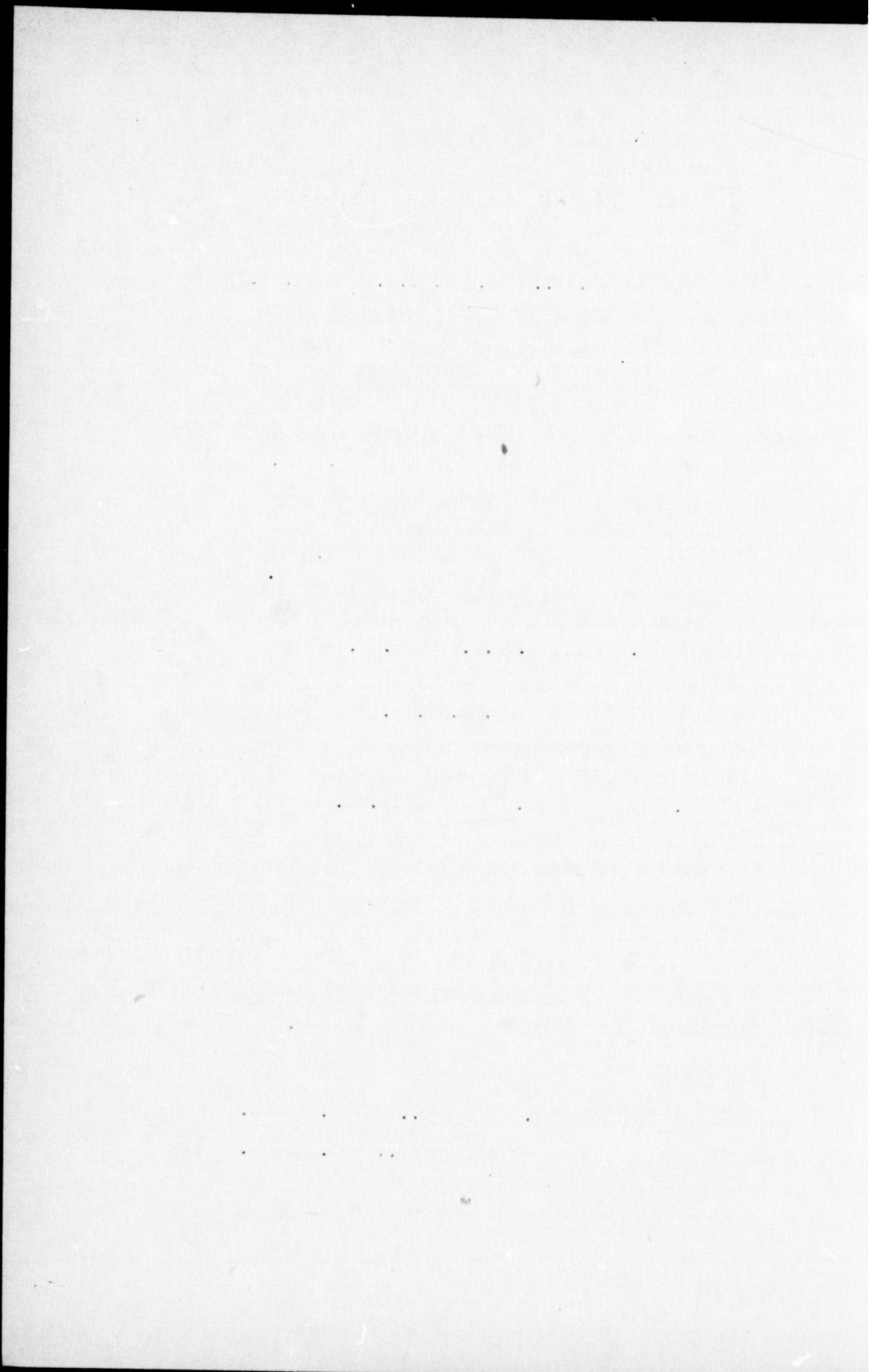
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA ex rel.
DONALD E. RAMSEY,

*Petitioner-Appellant,
against*

LEON VINCENT, Superintendent, Green Haven
Correctional Facility, Stormville, New York,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Whether the assistance of counsel that petitioner-appellant received during his trial for robbery deviated from constitutionally permissible standards?

Statement

This is an appeal by Donald E. Ramsey, a New York State prisoner incarcerated at Green Haven Correctional Facility, from a judgment of the United States District Court for the Southern District of New York (FRANKEL, J.), dated May 10, 1974, which, following an evidentiary hearing, denied his application for a writ of habeas corpus.

Ramsey is presently imprisoned pursuant to concurrent sentences imposed after two separate judgments of con-

viction in New York County Supreme Court (a) for robbery, following a trial by jury, for which he was sentenced on March 29, 1968 to a term of from 8½ to 25 years in prison; (b) for murder, for which, following his plea of guilty, he was sentenced on November 25, 1969 to a term of from 15 years to life imprisonment. However, the present appeal, involves only the robbery conviction.

Petitioner-appellant asserts that the assistance of his trial counsel, one Joseph S. Domanti, was so ineffective as to fall below constitutionally permissible standards. This alleged ineffectiveness is characterized as follows: (1) Domanti failed to adequately prepare for petitioner's trial. In particular, he failed to properly investigate a purported alibi defense (Plts. Brief, 9-12), (2) Domanti failed to ask for a *Wade-Gilbert* hearing [viz., *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967)] in regard to the identification testimony of the People's witnesses (Plts. Brief, 13-21), (3) Domanti failed to protect his client from prejudicial publicity relating to another pending indictment for murder (Plts. Brief, 22-25). Petitioner also asserts that his counsel made various errors regarding the building of a trial record (Plts. Brief, 26-27).

On May 13, 1974 Judge Frankel granted petitioner a certificate of probable cause.

Factual Background

On September 22, 1967, at approximately 8:30 p.m., a person who was subsequently identified as Donald E. Ramsey, and an associate, robbed the Project Liquor Store at 63 Avenue D in Manhattan.

Petitioner's identification was made by two store employees, Philip Epstein and Jose Roman, both of whom testified that they had recognized the unmasked Ramsey from his previous appearances in the store. (Trial Min-

utes, 25, ff.; 48-49, 60; the trial minutes, are hereafter cited as T.M.; see also, affidavit of Philip Epstein). The recognition was aided by the fact that the crime took approximately fifteen minutes to complete in well lit surroundings (T.M. 29, 42). In addition, Ramsey was holding a gun, and was no more than a foot and half from Epstein (T.M. 29) and "about three or four feet" from Roman (T.M. 45) for a large part of the time he was in the store.

Immediately after the robbery, Epstein, phoned the police and gave them a description of Ramsey (T.M. 34). Some time thereafter, police officers came to the store with five or six photographs, from which Epstein immediately picked out Ramsey (T.M. 38-9). This photographic identification constituted Epstein's sole involvement with police sponsored pre-trial identification procedures (Epstein Affidavit).

On October 8, 1967, Ramsey was arrested in connection with the brutal slaying of Linda Rae Fitzpatrick, the runaway daughter of a wealthy Connecticut businessman, and James L. Hutchinson—the slayings having occurred earlier that same day. That evening, although no charges had yet been placed in connection with the robbery, Ramsey was positively identified by Roman from a police line-up of at least four persons.

On November 3, 1967—approximately a month after the Roman identification—an indictment was filed charging Ramsey and one Randolph Leak with the armed robbery of the liquor store. On November 28, 1967, through his counsel Joseph Domanti, Ramsey entered a plea of not guilty to the robbery charge. Domanti was also representing Ramsey on the murder charge; however, he was fired following Ramsey's conviction for the robbery (see *infra*).

Following the selection of a jury, the trial on the robbery charge took place in New York County Supreme Court (MURTAGH, J.) from February 26, 1968 to March 1, 1968.

The People's case rested on the identification testimony of the two store employees. In response, calling only Ramsey himself as a witness, the defense advanced the theory that it would have defied common sense for Ramsey to rob a store where he could so easily have been identified and that, in reality, the identifications were the improper product of the wave of publicity arising from the Fitzpatrick-Hutchinson murders.

Ramsey testified that on the night of the crime he was at his home at 169 Avenue B in Manhattan playing drums, watching television, listening to music, and drinking with three male companions (T.M. 128) and with his wife (T.M. 169). The drum playing took approximately eight hours of their time (T.M. 169-170). The three males had come over at about noon and were with Ramsey continuously until midnight, at which time he walked them to the street (T.M. 128, 170-171). However, despite the length of the visit, Ramsey was able to identify only two of the men (T.M. 166) and one of these only by his African name (T.M. 128).

On March 1, 1968 the jury rendered a verdict of guilty.

Prior Proceedings

A. Earlier State and Federal Court Actions and Proceedings

The present claims were preceded by a series of unsuccessful attacks mounted by Ramsey in the state and federal courts against alleged evidentiary errors in his homicide conviction. Following state court exhaustion, the district court, after appointment of counsel, dismissed petitioner's habeas corpus application [*U.S. ex rel. Ramsey v. Zelker*, 356 F. Supp. 275 (S.D.N.Y. 1973)]; this Court then affirmed [480 F. 2d 916 (1973)].

Proceeding in logical fashion, petitioner similarly attempted to pry up the foundations of his robbery conviction. His present allegations—with the exception of the

publicity claims—were dismissed by the state courts as follows: by New York Supreme Court (FINE, J.) in a memorandum opinion dated July 27, 1972; by order of the Appellate Division, First Department, dated September 12, 1972 denying Ramsey a certificate granting leave to appeal (MCNALLY, J.); by a letter of the New York Court of Appeals, dated September 13, 1972, indicating that it lacked power to overturn the Appellate Division order.

B. The Hearing

On November 2, 1972, petitioner brought the present proceeding in the United States District Court for the Southern District of New York (FRANKEL, J.). Following the appointment of counsel, an evidentiary hearing was held on April 24 and 25, 1974. The testimony given at that hearing can be summarized as follows:

DONALD E. RAMSEY testified that he accepted Joseph Domanti's services as an attorney in the Fitzpatrick-Hutchinson murder on October 11, 1967 (Hearing Minutes, 11; the Hearing Minutes are hereafter cited as "H.M."). Thereafter, Domanti said he would "automatically" represent Ramsey in the robbery (H.M. 25). This was on or about November 28, 1967—the date Ramsey first learned he was a suspect in the robbery case (H.M. 23). When Ramsey indicated he was indigent, Domanti told him that he represented hippies in Ramsey's neighborhood and that he was "not interested" in money (H.M. 13). Domanti's recognition from the case would be adequate payment (H.M. 16-17).

Ramsey indicated that he had had some 25 to 30 visits from Domanti prior to the robbery trial (H.M. 41-43, 55-56). The visits tapered off after December, but he did see Domanti twice in February (H.M. 55-56), the months of the trial.

Adhering to his trial alibi, Ramsey claimed that on the night of the crime he was with three friends in his apart-

ment. However, he conceded that despite Domanti's request he was able to supply him with the "approximate address" of only one of these friends (H.M. 67) and with no phone numbers (H.M. 68). Ramsey indicated that he knew from his wife Domanti was having trouble locating the friends (H.M. 32).

Other testimony revealed the following discrepancies between Ramsey's hearing and trial versions of his whereabouts on the night of the crime:

(1) At the hearing he recited the names of each of the three persons in his apartment and contended he had given each to Domanti (H.M. 57-58, 61). At his trial, Ramsey was able to identify only two of the men—one by his African name only (T.M. 128, 160).

(2) At the hearing, Ramsey testified that his three friends each left his apartment at different times—one before dinner, one about 10:45 in the evening, the last at midnight (H.M. 62-63). At his trial Ramsey said they all left together at midnight and that he walked them to the street (T.M. 128, 170-171).

(3) At the hearing, Ramsey asserted that he played the drums for "about four and a half hours" (H.M. 65-66); at the trial, his estimate was eight hours (T.M. 169-170).

When told of these discrepancies, Ramsey asserted essentially that the hearing testimony was correct (H.M. 57-58, 61, 62-63, 66-67).

BARBARA RAMSEY testified that she was married to and living with Donald at the time of the crime (H.M. 80). She was at home the entire time Ramsey's friends were in the apartment (H.M. 90). One friend left early (H.M. 91); the other two left *together* at midnight (H.M. 90).

Ms. Ramsey asserted that she had never met or spoken to Domanti until the time of the trial (H.M. 84; 96-97)—this despite the fact she had previously left messages with his answering service asking him to call her (H.M. 85).

JOSEPH DOMANTI testified that he had obtained his law degree from St. John's University in 1961 and had practiced law ever since (H.M. 103). He was admitted to the New York State bar in 1961 (H.M. 103). Although he had done a large amount of criminal work between 1964 and 1967—prior to the time of Ramsey's case—his experience at that time was in misdemeanor trials (H.M. 104, 125). Ramsey was his first jury trial (H.M. 125).

He went to see Ramsey after petitioner's wife called him and asked him to represent her husband (H.M. 105, 131). Although he asked for and obtained Ramsey's version of the events (H.M. 107, 114, 134), he viewed the resulting material as "privileged" (H.M. 114A-116). Ramsey had asked him about publication of his story, but he told Ramsey "it wasn't even worth discussing . . . until after these trials were over" (H.M. 115). He firmly denied taking the case for its publicity value (H.M. 160-161).

Domanti spent approximately 50 to 75 hours preparing for the robbery trial (H.M. 106) and made several visits to petitioner in February—the month the trial began (H.M. 106). Ramsey told him about the three friends, but gave him only one name and no addresses or phone numbers (H.M. 109). Subsequently, after frequent contacts with Ramsey's wife, he met one of the three friends. But the man was unwilling to supply him with an address or phone number, was "very vague" and seemed unwilling to testify (H.M. 111). He decided not to use the man as a witness because he felt the man would be perjuring himself (H.M. 111). Moreover, when he told Ramsey of his difficulties, petitioner was unable to supply any further information (H.M. 112).

Domanti testified that he knew of the *Wade* and *Gilbert* decisions (H.M. 126-127) but had not asked for a hearing regarding the Roman-Epstein identifications because at the time he had the impression that the identifications were "pretty solid" (H.M. 120). He also did not view Roman and Epstein's testimony before the grand jury (H.M. 169-

170). However, at trial he subjected both men—particularly Roman—to a gruelling cross-examination.

Domanti asserted that he had had many discussions with Mrs. Ramsey prior to trial, but she seemed "very, very fearful" and she told him she didn't want to testify (H.M. 117). He asked her for the names of the alibi witnesses, but she was unable to locate them (H.M. 186-187).

As for James Reed—a witness who had allegedly witnessed a fight between Ramsey and Roman—Domanti was unable to recall whether he tried to or was able to locate him (H.M. 168). He reasserted that "I do recall generally that I had a lot of problems with witnesses" (H.M. 168).

BARBARA DODD ELLMAN testified that she was working as Domanti's law assistant at the time of the Ramsey case (H.M. 205). She asserted that she met Barbara Ramsey "a couple of times" prior to trial (H.M. 207), and that she seemed "afraid to testify" (H.M. 208).

Ms. Ellman recalled that on one occasion outside of court Domanti was contacted by an individual with respect to the Ramsey case. There was a discussion and Domanti told him if "it was going to be perjury that there was no need for him to say anything at all" (H.M. 206-207).

She was shown a series of typewritten pages with the typed signature "Donald E. Ramsey". These provided a description of Ramsey's whereabouts at the times of the Hutchinson-Fitzpatrick murders and the robbery and revealed Ramsey's apprehension about going near the liquor store after the robbery because he "might be recognised" (See Exh. "A", p. 17). Ms. Ellman said she had typed the sheets from handwritten pages, which she was no longer able to locate (H.M. 209-211). The sheets were introduced in evidence over the objections of Ramsey's counsel (H.M. 219). Ramsey was not recalled as a witness to testify as to the authenticity of the pages.

After both sides had rested, the Court—taking note of its decision in *United States ex rel. Thomas v. Zelker*,

332 F. Supp. 595 (S.D.N.Y. 1971)—asked Ramsey's counsel why the three alibi witnesses had not been produced at the hearing (H.M. 224). Counsel indicated that he had in fact spoken to two of the witnesses: one was "rather elusive" and it was counsel's judgment "it wouldn't be that useful" to produce him (H.M. 226); the other was reached by telephone and was apparently also thought not to be useful (H.M. 226). As for James Reed—the man who witnessed the Ramsey-Roman fight—it was counsel's judgment that he "is not a particularly responsible individual" (H.M. 227).

C. The Decision Below

Having reviewed the hearing record, "the considerable file of papers" submitted in reference thereto, and the state trial record, Judge Frankel, in a decision dated May 10, 1974, concluded that:

"both petitioner and his steadfast wife gave testimony at our evidentiary hearing which is not credible." (Opinion, p. 2)

Influenced "in significant respects" by this, Judge Frankel ordered petitioner's writ dismissed.

Turning to each of petitioner's specific claims, the Court found as follows:

With respect to the claim that Domanti had not adequately investigated Ramsey's alibi defense, Judge Frankel asserted that he was "convinced there were no such witnesses . . . and that the charge of dereliction in this respect is baseless because there was no valid alibi defense" (Opinion, p. 3).

With respect to the identification claim, the Court noted that "the brute fact [was] that the prosecution witnesses knew him [Ramsey] too well" (Opinion, p. 3). The Court continued:

"Not only does the state trial record show there was ample time during the robbery for petitioner's image

to impress itself upon the memories of the two prior action witnesses; it seems plain in addition that petitioner was known to one or both witnesses even before the crime." (Opinion, p. 4)

Indeed, because of the surety of the identifications, "petitioner was taking care after the robbery to stay off the street where the robbed liquor store was located" (Opinion, p. 4).

With regard to the claims of poor handling of spill-over publicity from the homicide charges, Judge Frankel found that Domanti's tactic of "undercutting" this publicity during the trial by continued reference to it, although "risky from our vantage point . . . is not to be condemned now and made the basis for nullifying the evidence" (Opinion, p. 5).

The Court found that there was no evidence that the jury had been affected by the pre-trial publicity regarding the murder charge or by two newspaper articles which appeared during the trial (Opinion, pp. 6-7). Indeed, the articles merely "recounted . . . evidence the jurors had heard in the courtroom" (Opinion, p. 7). In any event, it was by no means clear that the publicity claims had been exhausted in state court proceedings (Opinion, p. 7).

Finally, the Court rejected on the evidence all of petitioner's claims regarding Domanti's motives for taking the case and his failure to adequately prepare him.

ARGUMENT

Neither separately nor cumulatively did any of the so-called errors committed by Domanti involve a dereliction of his constitutional responsibilities.

As petitioner freely concedes in his brief, the requirements in this circuit for a claim of inadequate counsel are quite "stringent". Petitioner's memorandum, p. 7, citing *United States ex rel. Marcellin v. Mancusi*, 462 F. 2d 36,

42-43 (2d Cir. 1972), *cert. den.* 410 U.S. 917 (1973); also, *U.S. v. Yanishefsky*, — F. 2d — (July 30, 1974), sl. sh. — op. no. 1145.* Indeed, the mere showing of errors committed by counsel is not enough. *Marcelin*, 462 F. 2d at 42. Rather, it must be shown that the assistance was "so woefully inadequate as to shock the conscience of the court and make the proceedings 'a farce and mockery of justice'", *United States v. Currier*, 405 F. 2d 1039, 1047 (2d Cir. 1969), *cert. den.* 395 U.S. 914 (1969), quoting *United States v. Wight*, 176 F. 2d 376, 379 (2d Cir. 1949), *cert. den.* 338 U.S. 950 (1950); also, *United States v. Matalon*, 445 F. 2d 1215 (2d Cir. 1971), *cert. den.* 404 U.S. 853 (1971).

In the present proceeding, a close examination of the evidence bearing on each of petitioner's claims indicates that there is no basis whatsoever to disturb the findings of the District Court; at best, petitioner is simply indulging himself in a frivolous hindsight analysis of better ways that the defense could have been conducted. Cf. *United States ex rel. Crispin v. Mancusi*, 448 F. 2d 233 (2d Cir. 1971), *cert. den.* 404 U.S. 967 (1971).* Since the decision of the lower court is certainly not "clearly erroneous", it should in all respects be affirmed. 28 U.S.C. F.R.C.P. Rule 52(a); also *U.S. ex rel. Fitzgerald v. LaVallee*, 461 F. 2d 601 (2d Cir. 1972), *cert. den.*, *sub nom.* *LaVallee v. Fitzgerald*, 409 U.S. 885 (1973).

* Ramsey's claims appear to be fueled by a belief that since Domanti knew he would not get a fee from Ramsey and since Ramsey's murder case had attracted wide interest, counsel was motivated by a self-serving desire to get publicity (Applt's. Br. p. 10; H.M. 13, 16-17). However, other than an unproven assertion about Domanti telling him he would sell his story to a publisher (H.M. 16-17), Ramsey introduced no evidence to show profiteering by his counsel. Domanti testified that he told Ramsey any questions about the publication of his story "weren't even worth discussing . . . until after the trials were over" (H.M. 115). Rather than attributing monetary motives to Domanti, it seems far more rational to conclude that as a previous defender of East Village causes (H.M. 104, ff; Domanti Aff.), Domanti was simply taking a humanitarian interest in Ramsey's cause.

A. Pre-trial Preparation

Petitioner's preparation claim boils down to an assertion that his counsel failed to take the necessary steps to locate the three friends who would allegedly confirm his alibi defense. However, as the District Court has bluntly noted, the contention is simply "not credible" (Opinion, p. 2).

In the first place—and this cuts to the heart of this entire proceeding—a comparison of Ramsey's own testimony at his trial with his testimony at the evidentiary hearing casts serious doubt on the authenticity of the entire alibi story. Such a comparison reveals the following glaring discrepancies.

(1) At the hearing, Ramsey recited the names of *each* of the three friends who were allegedly in his apartment and contended he had given them all to Domanti (H.M. 57-58, 61). But at his trial Ramsey said he was able to name only two of the men (T.M. 166); at no time did he know the name of the third man (T.M. 167).

(2) At the hearing, Ramsey testified that his three friends each left the apartment at different times—one before dinner, one about 10:45 p.m., and the last at midnight (H.M. 62-63). At his trial, Ramsey asserted that all three men left at midnight and that he accompanied them to the street (T.M. 128, 170-171). In still a third version, Barbara Ramsey asserted that *two* of the men left together at midnight (H.M. 90).

(3) At the hearing, Ramsey asserted that he played the drums for "about four and a hours" (H.M. 63-69); but at the trial his estimate was eight hours—or almost *double* the hearing time (T.M. 169-170).

Aside from these devastating inconsistencies, there is the further and even more significant fact that *none* of the male alibi witnesses were called to testify at the hearing—this despite the admission of Ramsey's very diligent counsel that he and an associate had contacted two of the witnesses.

Indeed, it is quite revealing that counsel—attempting to explain away the absence of one of the witnesses—characterized his statements as “rather elusive” and then noted that it was his view that the witness “wouldn’t be that useful” (H.M. 226).

Finally, there is evidence—illustrated by a self-serving statement from Ramsey to his trial counsel (Exh. “A”, p. 17)—that Ramsey was afraid to go back to the street where the liquor store was located because he feared he would be identified.

In any event, aside from the credibility or, rather, lack of credibility to the alibi story, there is the simple reality that Ramsey himself and not Domanti must carry the onus for the non-production of the alibi witnesses.

The hearing record plainly indicates that the only help petitioner was able to furnish Domanti in tracking down the witnesses—though at least two of them were allegedly good friends—was an “approximate address” of one person (H.M. Ramsey, 67; Domanti, 109). In addition, despite Domanti’s entreaties, Ramsey was able to furnish no phone numbers (H.M. Ramsey, 68; Domanti, 109). Nor was petitioner’s wife any more helpful during her frequent pre-trial contacts with Domanti (H.M. 186-187).*

* Even if one credits Mrs. Ramsey’s testimony—that she did not meet or speak to Domanti until the start of jury selection (H.M. 84, 96-97) it is still clear, from her own words, that the best she was able to do was locate one of the men and that Domanti was unwilling to use him (H.M. 86-87).

As for Ms. Ramsey’s statement that she was prepared to testify at the trial (H.M. 84), this was sharply contradicted by the recollection of Domanti and his secretary, both of whom asserted that she was extremely fearful and unwilling to testify (H.M. Domanti, 117; Ellman 207-208). In view of the numerous contradictions in Ramsey’s alibi story, it is difficult to give any credence to Ms. Ramsey’s remarks. In any event, her testimony as a witness at the hearing did little to enhance her husband’s story.

In spite of these difficulties, Domanti eventually met with one of the three so-called friends outside of the courthouse. However, because the man was vague and seemed unwilling to testify, Domanti was afraid he might perjure himself on the witness stand (H.M. 111). Domanti's account of this incident was borne out by his law assistant who accompanied him at this time (H.M. 206-207). The unreliability of Ramsey's witness is further demonstrated by the fact, already noted, that his hearing counsel also decided not to use them.

Clearly, what was involved here was not a failure to investigate, but, rather, a reasonable tactical decision not to call witnesses after an investigation—the best that could be made under the circumstances—was completed. See *United States ex rel. Crispin v. Mancusi*, cited *supra*; *dist. United States ex rel. Thomas v. Zelker*, 332 F. Supp. 595 (S.D.N.Y. 1971), where counsel failed to investigate key character witnesses who could have impugned the character of an alleged rape victim. (The case, which was relied on heavily by the petitioner in the court below is distinguished by the court itself at H.M. 224, ff. Not surprisingly, it is not cited by petitioner here.)

Aside from the alibi investigation claim, petitioner also asserts that Domanti did not adequately prepare him as a witness (Brief, p. 12). However, this was sharply contradicted by Domanti, who asserted, in an affidavit and in his testimony at the hearing (H.M. 106, ff.), that he had spent 50 to 75 hours on the case and had gone over the basic details of Ramsey's defense, on several occasions. Indeed, Ramsey himself conceded that in February, the month of the trial, he saw Domanti twice.

B. The Wade-Gilbert Claim

At the core of petitioner's *Wade-Gilbert* claims (*United States v. Wade*, 388 U.S. 218 [1967]; *United States v. Gilbert*, 388 U.S. 263 [1967]) is an assumption that the un-

asked for identification hearing would have shown that Ramsey's identification by Roman was irreparably tainted by the failure to give him counsel during the stationhouse viewing. However, the assumption is blatantly absurd.

In the first place, the so-called irreparable taint in Roman's identification was hardly that. At the time of his viewing by Roman on October 8, 1967, Ramsey, by his own admission, was *not* under arrest for the robbery charge but, rather, *only* for the Fitzpatrick-Hutchinson murders, which were committed earlier that same day (see Applt's. Br. p. 16). Thus, since he was being held for a crime unrelated to the purpose of the viewing, it is obviously inaccurate for him to assert that there had been an "initiation of judicial criminal proceedings", within the meaning of *Kirby v. Illinois*, 406 U.S. 682, 685 (1972) and that he was therefore entitled to have counsel present (*id.*, at 685); also *U.S. ex rel. Robinson v. Zelker*, 468 F. 2d 159 (2d Cir. 1972), *cert. den.* 411 U.S. 839 (1973), where the filing of an arrest warrant was held to constitute the initiation of judicial proceedings.

Ramsey's further attempt to distinguish *Kirby* on the ground that his situation involved a surreptitious show-up is plainly frivolous. Roman's testimony at the trial plainly indicates that he picked Ramsey out, unaided, from a group of *at least four* persons. This, rather than the fact Ramsey may not have known he was being viewed, is the significant reality.

In any event, apart from the question of a stationhouse taint, the crucial and obviously controlling point is that there is clear and convincing evidence that the in-court identification by Roman was based on his "opportunity . . . to view the criminal (Ramsey) at the time of the crime", *Neil v. Biggers*, 409 U.S. 188 (1972), at 199; also *U.S. v. Wade*, 388 U.S. 218, 240 (1967); *U.S. ex rel. Armstrong v. Casscles*, 489 F. 2d 20, 23-24 (2d Cir. 1973); *United States ex rel. Gonzales v. Zelker*, 477 F. 2d 797, 800, 803-804 (2d

Cir. 1973). Roman—and for that matter Epstein as well—had a time period of approximately fifteen minutes under good lighting conditions to observe Ramsey. In addition, Ramsey was unmasked and Roman recognized him as a previous customer. Equally importantly, Roman was motivated to make the observation by the fact that Ramsey was holding a gun on both he and Epstein and threatening to kill them. All of these factors, either *singularly* or *collectively* have been held to be a more than adequate basis for a witness' independent recall. *Armstrong*, cited *supra*; *United States ex rel. Phipps v. Follette*, 428 F. 2d 912, 915 (2d Cir. 1970).

The culminating absurdity to Ramsey's *Wade-Gilbert* claim is that it involves only the identification of Roman. Thus, in effect, Ramsey concedes that there was nothing improper about the identification made by Roman's co-employee, Philip Epstein, who viewed Ramsey under the same circumstances as Roman and whose only subsequent involvement with the police was to pick Ramsey's photograph from a group of photographs (T.M. 35-39; Affidavit of Philip Epstein). This other identification, which was testified to at considerable length by Epstein (T.M. 25-41), would alone have been sufficient for Ramsey's conviction.

Plainly, the situation here is readily distinguishable from that in *Saltys v. Adams*, 465 F. 2d 1023 (2d Cir. 1972), a case noted by appellant at considerable length in his brief (*viz.*, 19, ff.). There, the opportunity of each witness to observe the defendant was no more than thirty seconds and, even more important, the defendant was not previously known to the witnesses, prior to the crime. In fact, the situation here is far more readily analogous to that in *U.S. v. Yanishefsky*, — F. 2d — (2d Cir., July 30, 1974), sl. sh. op. no. 1145, where the fact that the identifying witness was several feet from the perpetrator—although only for a short period of time—and was thoroughly examined at trial (like Roman in the present case),

was held to eliminate any prejudice that might have inured to petitioner because of his counsel's failure to ask for a hearing regarding an allegedly improper photographic display.

C. The Publicity Claims

Petitioner's publicity claims may be reduced to the following argument: that Domanti through a series of alleged mistakes failed to insulate Ramsey from jury prejudice that might have inured as a result of the publicity his indictment for the Fitzpatrick-Hutchinson murder was receiving. Counsel's allegedly fatal errors may be summarized as follows: (a) he failed to ask that a *voir dire* record be made; (b) he failed to ask for a change of venue; (c) he failed to take steps to insure that this client's rights had not been prejudiced by two articles that appeared during the trial.

The initial bar to this claim, as noted by the lower court, is that they do not appear to have been raised and certainly were not considered in the many state court determinations involving Ramsey's post-conviction claims. Thus, the claims must be dismissed for failure to meet the exhaustion requirement of 28 U.S.C. § 2254(b). *Picard v. Connor*, 404 U.S. 270, 278 (1971), as cited in *U.S. ex rel. Nelson v. Zelker*, 465 F. 2d 1121, 1124 (2d Cir. 1972), cert. den. 409 U.S. 1045 (1972). [See the Supplemental Affidavit of David R. Spiegel, dated February 11, 1974, for a more complete treatment of the exhaustion argument].

In any event, the claims are plainly meritless.

The *voir dire* claim rests entirely on conjecture as to what might have happened. In this regard, it is wholly distinguishable from the cases cited by petitioner, where a *voir dire* record *was* in existence and *did* show prejudice; e.g., *Irvin v. Dowd*, 366 U.S. 717, 727 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 725 (1965); *United States ex rel.*

Bloeth v. Denno, 313 F. 2d 364 (2d Cir., 1963), *en banc cert. den.* 372 U.S. 978 (1963). Here, in effect, Ramsey asks this court to infer the worst: that had a *voir dire* record been produced, it would have supported his claim of juror bias. This is not unexpected in view of Ramsey's position, but, as the District Court has already indicated, it is unsupported by reality. Domanti's testimony at the hearing (H.M. 190) and his pre-hearing affidavit indicates that the issue of bias was in fact covered in the questioning of the prospective jurors and that Ramsey himself had the primary hand in juror selection. In any event, there seems to be no reason to assume that the jurors would have been adversely affected by publicity which had clearly died down and had been replaced by other news at least four and a half months prior to the trial.

This latter point underscores the initial fallacy in the change of venue claim. This circuit has consistently held that change of venue is unnecessary in instances where a substantial period of time, one comparable to the period in this instance, elapses between a wave of pre-trial publicity and the actual trial. *United States ex rel. Rosenberg v. Mancusi*, 445 F. 2d 613 (2d Cir. 1971), *cert. den.* 405 U.S. 956; *United States v. Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967), *revd. on other grds.* 437 F. 2d 862 (2d Cir. 1970). Clearly, this was the situation at the time the jury was selected.

Moreover, it can be reasonably argued that the transfer of the Ramsey robbery trial to a distant, less urbanized area than New York might ultimately have decreased rather than increased petitioner's chances for a fair trial. As the Court noted in *United States v. Dioguardi*, 428 F. 2d 1033 (2d Cir. 1970), *cert. den.* 400 U.S. 825 (1970):

"We add the counsel of experience that transfer from a metropolitan area to a smaller city may result in more rather than less intensive publicity". (*id.*, 1039).

As for the third claim, like the first, it asks this Court to infer the worst from an omission. Obviously, since Mr. Domanti never did poll the jury, we can never know whether the two New York Post articles in question *did* reach members of the jury and, more importantly, *did* influence them against Ramsey. However, a close reading of these articles indicates that the view taken in the Domanti affidavit—that, on balance, they were not harmful to his client—is not an unreasonable one. Nor do the stories appear to be especially significant. They were written as routine journalistic reports of the trial and are buried on the inside pages of the *Post*. Indeed the situation here is easily distinguishable from *United States v. Rattenni*, 480 F. 2d 195 (2d Cir. 1973), where six of the jurors admitted hearing a broadcast that was prejudicial to the claimant.

Moreover, contrary to petitioner's assertions, the record of the trial does indicate a model effort to warn the jurors not to discuss the case or read or be influenced by press comment on it (T.M. 5-6; 120; 138-139; 192-193; 309-311). In fact, commenting with specific regard to the first of articles noted by petitioner, the court delivered the following warning to the jury:

"The jury is admonished not to discuss the case among yourselves or with anyone else. If anyone should approach you to discuss the case kindly report the incident to the Court. You are to maintain an open mind until the case is formally submitted to you for deliberation.

Now, there was a bit of newspaper publicity yesterday on the case. I trust that no one has read it. If he has, he is to ignore anything that was in it. The only evidence in this case is evidence that is presented in this courtroom not what you learn outside.

In addition, may I ask you, please, to avoid reading anything about the case that is published, or listening

to anything on the radio, should it be published, until you have rendered a verdict in this case". (74)

Significantly, no juror stepped forward at this time, or at any other time to acknowledge reading the articles in question. Again, this contrasts with the situation in *Rattenni*, cited *supra*; see also *Marshall v. United States*, 360 U.S. 310, where it was noted, with regard to situations involving allegedly inflammatory articles written during trial, "each case must turn on its special facts" (*id.* at 312).

The sum total of petitioner's speculation about his counsel's errors is hardly the "carnival atmosphere" proscribed by the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1960); see also, *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Bloeth* case, cited *supra*, p. 26. Instead, what the record reveals is a trial kept reasonably free of contaminating influences. The language of *Irvin v. Dowd*, 366 U.S. 717 (1961), is obviously applicable here:

"It is not required . . . that the jurors be totally ignorant of the facts and crimes involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court" (*id.* 722-723).

See also, *Rosenberg*, 445 F. 2d 613; *United States v. Gras-sia*, 354 F. 2d 27 (2d Cir. 1965), revd. on other grds., 390 U.S. 202 (1968); *United States v. Addonizio*, 451 F. 2d 49 (3rd Cir., 1972), cert. den., 405 U.S. 936 (1972).

D. Miscellaneous Errors in Failing To Protect The Trial Record

The so-called miscellaneous errors committed by Domanti in failing to protect the trial record—insofar as they are not already duplicated by prior claims (Points "A" to "C", *supra*)—amount essentially to pointless, quibbling about counsel's trial tactics and, as such, are without merit. *Marcelin, Currier* cases, *supra*, p. 16.

The contention that Domanti should have asked for an adjournment to search for the alleged alibi witness is explainable by the simple reality that the witnesses were apparently not available. Indeed, despite their alleged importance, the witnesses were not even produced for the federal evidentiary hearing (See Point "A", *supra*).

The assertion that Domanti should have taken exception to the Judge's charge was answered by Domanti at the hearing; he thought the charge was proper (H.M. 193). Moreover, petitioner has not cited anything about the charge that was prejudicial to him, either here or in the District Court. Obviously, an exception does not have to be taken for the sake of taking an exception.

Finally, the contention that Domanti did not file an appeal for Ramsey is obviously frivolous in view of the fact that the state courts did eventually resentence Ramsey *nunc pro tunc* and permit him to take *several* subsequent appeals from his conviction. In fact, Ramsey can hardly claim that he has not had a fair opportunity to appeal either his robbery or his murder conviction.

CONCLUSION

The judgment of the District Court should in all respects be affirmed.

Dated: New York, New York, September 19, 1974.

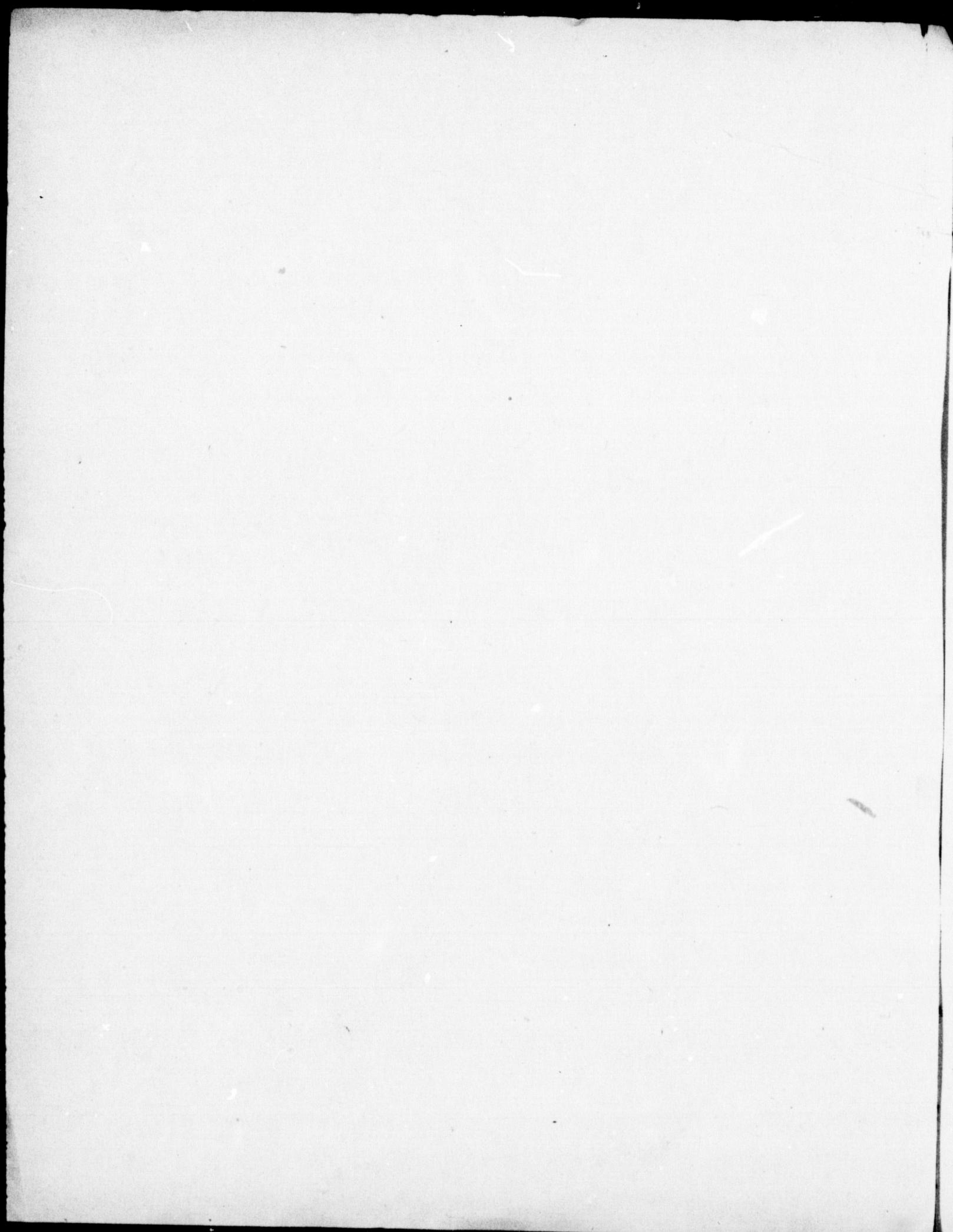
Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel

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Received
ST McLean 3:00 PM
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